No. 7102

United States Circuit Court of Appeals

For the Ninth Circuit

HARRY D. McCLEARY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MONTANA, MISSOULA DIVISION

HON. GEORGE M. BOURQUIN, JUDGE

Petition for Rehearing

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FILED _____, 1933

_____ Clerk.

THURBER'S, HELENA

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JUN 15 1933
PAUL P. O'BRIEN,

SUBJECT INDEX

TABLE OF CASES

TEXTS

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TO THE HONORABLE CURTIS D. WILBUR, WILLIAM H. SAWTELLE and JULIAN W. MACK, Circuit Judges:

Comes now the appellant in the above entitled cause and petitions this honorable court that it reconsider its opinion heretofore filed in the above entitled cause, and that it grant the appellant a rehearing herein, and bases his petition upon the following grounds:

I.

The court based its opinion and decision upon a misconception of the evidence in the case in that there was substantial evidence of permanency and that this was not a case of incipient tuberculosis.

II.

The court miscontstrued the decisions of the Tenth Circuit Court of Appeals as is shown by the latest decision of the Tenth Circuit Court in the case of *United States v. Thomas.*

III.

The court did not give proper weight to the fact that tuberculosis is still a dreadful and killing disease.

IV.

The court did not properly distinguish this from

other tuberculosis cases, and gave too strict a meaning to the word "permanent."

V.

The court did not give proper evidentiary value to the fact that permanence may be shown by continuation of a fact—in this case, total disability.

VI.

The court invaded the province of the jury and weighed the evidence.

ARGUMENT

THE COURT BASED ITS OPINION AND DECISION UPON A MISCONCEPTION OF THE EVIDENCE IN THE CASE IN THAT THERE WAS SUBSTANTIAL EVIDENCE OF PERMANENCY AND THAT THIS WAS NOT A CASE OF INCIPIENT TUBERCULOSIS.

There was positive testimony by Dr. Hobson in behalf of the plaintiff that he was suffering with active pulmonary tuberculosis since he was gassed and had influenza while in the service and before his policy, herein sued upon, would have lapsed for non-payment of premium. We find in the record in this case the following testimony by Dr. Hobson:

"***The symptoms of active tuberculosis are loss of weight, temperature, rise in pulse rate, weakness, general lack of ambition, certain physical findings in the lungs, consisting of impaired resonance with rales, and a positive sputum, are the generalized symptoms of active tuberculosis. If the evidence shows that McCleary had all of these symptoms with the exception of the positive sputum, during any period of time, as to the probability being that he was active, I will say, considering his history of influenza and his history of pleurisy with effusion, I would consider that he has been active since that time, for the reason that a great many cases of tuberculosis follow a severe influenza with pro-bronchial involvment." (R. 50)

Dr. Hobson further testifies:

"***It is entirely possible for one with tuberculosis to work or follow an occupation; it is so possible even with active tuberculosis. It would, however, very much endanger his life to do so, I think. It is true that some individuals, suffering from active tuberculosis, can work and carry the load of working, while others cannot." (R. 50)

The attention of this court is directed to the testimony of the plaintiff in regard to his physical condition:

"***I was gassed in the Argonne on the 26th

of October, 1918; I inhaled gas and it made me very sick at the time. I also had influenza while in the army, which I contracted after I was taken to the hospital from the Argonne. I was in the base hospital at Nance, France, and as I remember it was a patient there between four and five months. At that time I was under weight, had night sweats which were severe and I run a temperature all the time.***" (R. 14)

"***I was at home from the date of my discharge, about a year at that time, and I was sick all of that time and not able to do anything. I felt weak and didn't have any energy to do anything. My joints bothered me, I had a cough and chest pains, coughed and spit up a lot of sputum all the time.***" (R. 15)

"***I have been advised by examiners in the Veterans' Bureau hospital as to what my condition or disability is, the United States Government gave me a total permanent disability, for pulmonary tuberculosis. There is a way a person can tell when they have that disease, and I don't have any trouble knowing I have it for I cough a lot, spit up bad sputum and blood, sometimes, and I have night sweats all the time and run a temperature in the meantime. I think my condition has altered some since I got out of the hospital and the army; my condition has steadily grown worse all the time since I was discharged from the service. Since my discharge I have not been free from temperatures;

I have not been free from the pain condition in the chest.***" (R. 18-19)

The court's attention is directed to the testimony given by Dr. Duncan L. Alexander:

"***I first examined Mr. McCleary in May, 1920, I found him suffering from a cough, purulent expectoration, temperature continued.***" (R. 34)

"***I further examined the patient on the third day of July; the name here is in the bookkeeper's handwriting, but the notation is mine. The symptoms were fever, continued cough with expectoration purulent, repeated examination of which showed negative for tubercular organisms. There was pain in the chest and difficulty with respiration, that is, with the [37] breathing, during the acute attack. A dullness in one of the lungs developed about the first of June, 1920, and on the second of June aspirated the pleural cavity, without record as to which side, and obtained a clear yellow fluid. *** At that time my diagnosis of his condition, clinically and not from bacteriological findings, was a tubercular infection, which in my judgment was the thing that was prevalent. Asked if I would classify that as active pulmonary tuberculosis, well it was certainly very active.***" (R. 35)

"***I found rales in this man; they were over the apices, in fact they were general over the chest, as I remember it,***" (R. 40)

Josephine McCleary, the wife of plaintiff testified in part as follows:

> "***I think the second week after we were married he was to work, and I noticed that he coughed almost constantly and especially at night, and he was exhausted and he just didn't seem natural or normal to me, he just didn't seem well; it seemed like he would get feverish and irritable. I have been with him part of the time during the past two years and I am living with him now. He has that constant cough now, and brings up a lot of sputum sometimes. I noticed the same symptoms right away after we were married.***" (R. 29)

> "***I also observed the indications of night sweats that he testified to. I observed those first very shortly after we were married, in fact right after we were married.***" (R. 29)

The mother of the plaintiff, Mrs. E. M. McCleary testified in part as follows:

> "***He went away a perfect specimen of young manhood and came back a perfect wreck; he was sick, poor and emaciated, coughing, and could hardly walk.***" (R. 41)

Dr. G. D. Waller testified in part:

> "***I am employed now by the United States Veterans' Administration, at Fort Harrison, Montana.*** I know Harry D. McCleary. I

made a physical examination of him I think it was in March, 1932. That examination was made in conjunction or consultation with the board of three, of which I am a member. ***Using this report to refresh my memory, we found Mr. McCleary to be suffering from a far advanced active tuberculosis and a chronic pleurisy of both lungs. Asked to what degree of disability with reference to whether it is total or less than total we found existed, my answer is total. Asked what my judgment is as to the prognosis, with reference to its permanency, the chances are that it is permanent. In my judgment I would say that should continue throughout the remainder of his lifetime.***" (R. 42-43)

The only medical testimony at an early date in the record is that of Dr. Alexander. We submit that there is nothing in Dr. Alexander's testimony to indicate that McCleary at that time was suffering from incipient tuberculosis. It is true that the doctor was very conservative and did not give a prognosis, nor did he estimate how long he considered McCleary had suffered from active tuberculosis, but he did say "I found rales on this man; they were over the apices, in fact they were general over the chest, as I remember it." (R. 40)

All of the evidence in the record in this case considered together, we submit, is such that the minds

of reasonable men might well differ as to the effec' of such evidence, and it should require the submission of this case to the jury.

> "Where uncertainty as to the existence of negligence arising from a conflict in the testimony, or because, the facts being undisputed, fairminded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. Citing cases." Gunning v. Cooley, 281 U. S. 90; 50 S. Ct. 231, 74 L. Ed. 720.

II.

THE COURT MISCONSTRUED THE DECISIONS OF THE TENTH CIRCUIT COURT OF APPEALS AS IS SHOWN BY THE LATEST DECISION OF THE TENTH CIRCUIT COURT IN THE CASE OF UNITED STATES v. THOMAS.

This case was decided by this court upon authority of the decision of the Falbo case and consequently the rule in that case, as laid down by this court, is all that counsel has upon which to base this petition for rehearing, although the facts in that case are not the same as in the instant case. In the Falbo case this court follows and adopts the decision of the Tenth Circuit Court in United States v. Rent-

frow, 60 Fed. (2d) 488. The case of United States v. Rentfrow is clearly distinguishable from this case, for the reason that the Rentfrow case was not one in which a trial judge had directed a verdict, but was a case that had been tried by the court without a jury, and in the Rentfrow case Dr. Calhoun testified that he served with the insured during the war. That the claimant was not sick except with a cold and the flu, although he had a cough which the doctor attributed to cigarettes. The doctor did not see the plaintiff until 1922 and diagnosed the case as tuberculosis. That he advised the insured to go to a hospital, and "he testified that, if the insured had gone to a hospital or sanitarium at that time, he would probably have become an arrested case; that he did not believe that at that time insured's condition was permanent, if he followed the treatment prescribed." This was the only medical testimony in the Rentfrow case and Judge McDermott specifically stated:

> "There is no evidence, however, of the permanence of the disability. The only direct evidence on the subject is that of Dr. Calhoun who testified that in 1922 his condition was not a permanent one, and that the disease would probably have been arrested if the insured had followed the treatment prescribed."

And the court stated:

> "It is a matter of common knowledge, as this court took occasion to say in Nicolay v. United States, supra, that many incipient tuberculars respond readily to the simple treatment of rest and nourishment, and are thereafter able to follow many gainful occupations."

The only medical testimony in the Rentfrow case then was to the effect that Rentfrow was not permanently disabled; that he had reached a condition of arrest; that he had incipient tuberculosis at the most while the policy was in force.

In this case there is no evidence that McCleary ever became arrested after he contracted tuberculosis, as the evidence of plaintiff, if believed, clearly shows the examination reports introduced by defendant were merely perfunctory and were not reports of physical examinations. The evidence of temperature, night sweats, cough, general weakness, and the other symptoms testified to, would clearly indicate a continued activity, from the time McCleary was discharged from the army, of his tuberculosis condition, and also shows that his condition was far past the incipient stage before his policy lapsed, or would have lapsed, and that a jury would have been warranted in finding his tuberculosis had reached an advanced stage before his policy lapsed.

The real holding of Judge McDermott in the Rentfrow case is made all the more clear by his decision in the case of United States v. Thomas (CCA 10), decided March 28, 1933, not yet reported, and Judge McDermott in that case stated in part as follows:

> "Doctor Colton diagnosed his case in July, 1919, as arthritis and chronic throat condition; in 1922 there was a definite chest pathology—a retraction of the apices with diminished resonance or percussion, changed breath sounds, and other evidences which convinced the physician he was affliced with tuberculosis which bordered between moderately and far advanced, and that he was probably afflicted with the disease in 1919."

And further along in the opinion Judge McDermott says:

> "Counsel for appellees have brought to our attention valuable excerpts from the Report on Tuberculosis made in 1932 by Dr. Arthur Salusbury MacNalty, Senior Medical officer for Tuberculosis of the Ministry of Health of London; and from the recent work of Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, on Pulmonary Tuberculosis. From these, it appears that the effect of tubercle bacilli varies widely with the individual infected therewith, and that it is impossible to make a definite prognosis at the outset of the disease. It follows,

therefore, that while we are concerned only with the condition of the insured when his policy lapsed, subsequent events are of vital import in determining his then condition."

And further Judge McDermott says:

"Taking into view the entire history of the insured in this case, we find much more than the ordinary case of minimal or incipient tuberculosis. We find a man whose entire system had been shattered, and his resistance lowered, by months of unremitting exposure to the elements in a forbidding climate; we know now that the disease had, in all probability, passed the minimal stage, even then." United States v. Thomas (CCA 10), decided March 28, 1933.

In the Thomas case it appeared that the veteran had taught school for about four years, did some work for a building and loan association, took some vocational training and worked for a while as time keeper in a mine.

III.

THE COURT DID NOT GIVE PROPER WEIGHT TO THE FACT THAT TUBERCULOSIS IS STILL A DREADFUL AND KILLING DISEASE.

The court, in its opinion in the Falbo case seems to have fallen into the error recently apparent in the

opinions of the Eighth and Tenth Circuit Courts, and assume judicial notice of a fact, to-wit: that tuberculosis is curable, which fact is denied by authorities dealing with this disease.

Dr. Arthur Salusbury MacNalty, Senior Medical Officer for Tuberculosis Ministry of Health, London, stated the following, in his 1932 report:

> "Tuberculosis is still a killing and tragic disease, the 'Captain of the Men of Death' as Bunyan called it." MacNalty Report on Tuberculosis for 1932, Page 2.

In his report on page 87, MacNalty gives statistics, showing that 33 per cent of the deaths occurring in England, among the male population, between the ages of 15 and 35, during the year 1929, were the result of tuberculosis. In the same year, figures show that in England, out of 35,550 persons admitted for sanitorium treatment, only 18 per cent were discharged in a quiescent condition; that of these admissions, 13,637 were admitted without a positive sputum, and of those only 37 per cent were discharged in a quiescent condition. And speaking of sanitorium treatment, he says:

> "Although sanitorium treatment may secure quiescence of the disease, in a reasonable proportion of cases a definite tendency to relapse

> remains. It is, therefore, necessary in attempting to assess the true value of sanitorium treatment, to study the after-histories of patients." MacNalty, a Report on Tuberculosis, 1932, Page 90.

And in the United States in 1929 we find that 13,722 deaths among the male population, between the ages of 20 and 35, were due to tuberculosis, while only 13,348 deaths were attributable to heart disease, cancer, nephritis and cerebral hemorrhage and pneumonia combined, which were the other leading causes of death in the United States that year, excluding accidents. Mortality Statistics, 1929, pages 196-219, U. S. Dept. of Commerce.

Referring to the possibility of an arrest of the plaintiff's tubercular condition, it would seem extremely problematical that such an arrest, could one have been effected, would have been permanent.

Dr. Maurice Fishberg, Chief of the Tuberculosis Service, Montefiore Hospital, and its country sanitorium for incipient tuberculosis, an internationally recognized authority, states in his work on tuberculosis, speaking of arrested cases:

> "If the improvement had been attained through careful treatment in a favorable environment, the test is whether the patient remains in good condition for some time after returning to his

old environment without suffering a relapse of the constitutional symptoms. The test, in other words, is duration; improvement counts if it last without special treatment." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 247.

And he further states:

"Indeed, I have been struck with the fact that when a patient who recovered from phthisis (tuberculosis) is unable to pursue the vocation for which he has been trained for many years, he will not be well, even if he remains idle indefinitely." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 308.

And further:

"On the whole, it appears that cured patients do best when returning to their old vocations for which they have been trained, and at which they can earn most with the least possible effort. It may be said that, with some striking exceptions, if a patient is not able to pursue his former line of work he is altogether disabled." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 309.

As applied to this case, these authoritative quotations of Dr. Fishberg mean, that assuming the existence of the possibility to cure the plaintiff in 1919, that nevertheless, that cure would not have been permanent. As it is highly improbable, that even

assuming a cure, this plaintiff could have returned to his former vocation (labor). And paraphrasing the Doctor's statement, we might say *that if the plaintiff is not able to pursue his former line of work, he is altogether disabled.*

The error in assuming even that incipient tuberculosis is curable, is clearly apparent from the following quotation:

> "*The notation that this disease is curable in its incipient state is one of the medical half-truths which have gained universal credence because of tradition. There are so many exceptions as to almost nullify this ancient dictum.* We have already shown that it is fallacious to classify phthisis into three or four stages, and to say, without reservation, that in the first stage it is curable; in the second stage the chances of recovery are considerably diminished, while in the third stage it is incurable.
>
> "*There are 'incipient' cases detected as early as is humanly possible which have no chance, irrespective of the treatment applied;* while there are many in the third stage whose chances of survival and even of efficiency are excellent." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Pages 232-233.

It may be that in assuming judicial knowledge of the curability of tuberculosis, the court has been misled by the knowledge that ninety-five per cent of

us have some tuberculosis activity at some time during our lives, as we are told by specialists in this disease. However, the question is not whether or not we have tuberculosis, it is a question of whether or not the tubercle bacilli makes the individual sick. And if it does, he has the disease of tuberculosis and not the so-called "incipient tuberculen."

Dr. Fishberg states:

> "It must, however, be mentioned here, *** that in human beings infection alone is not sufficient to produce disease; after all, disease occurs only in a comparatively small proportion of persons infected with tubercle bacilli. In other words, while there is no tuberculosis without tubercle bacilli, these micro-organisms harm only those who are predisposed to the disease. We are more and more becoming convinced that phthisiogenisis is more a problem of predisposition than of bacterial infection." Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume I, Page 112.

Referring again to Dr. Fishberg, we find figures to show that of over 1,900 insured tuberculars that were treated in sanitoriums in the year 1914, that within six years, or in 1920, 76.5 per cent were dead, and of the remaining 23.5 per cent, half were unable to work. Fishberg, Pulmonary Tuberculosis, 1932 Edition, Volume II, Page 354.

As applied to this case, we find that the symptoms which were present in and exhibited by the plaintiff, Harry D. McCleary, and to which he testified, and to which his mother, Mrs. E. M. McCleary testified, before his policy would have lapsed, were evidence of the existence of the disease, rather than mere infection, which disease was then disabling in character and deadly in consequence.

Referring to the case of Rentfrow v. United States, and the cases following that case, relied upon by this court in its opinion, attention is directed to the fact that the Tenth Circuit has now realized their mistake, and the injustice of their assumption of the curability of tuberculosis, and have limited, if they have not overruled the doctrine laid down in those cases.

In the case of the United States v. Thomas, wherein the plaintiff's intestate worked for a period of four years teaching school, worked some for a building and loan association, took vocational training and worked as a timekeeper in a mine, and where the first finding of any definite chest pathology was in 1922.

Judge McDermott, the author of the opinion in the case of the United States v. Rentfrow, said:

> "It has been held by this and other court that the plaintiff must establish, by substantial

The court in its opinion has quoted from the case of United States v. McCreary (CCA 9), 61 Fed. (2d) 804, to the effect that the plaintiff must show that his disability was "reasonably certain to be permanent during lifetime." Such statement seems ill advised and casts the burden upon the plaintiff of proving that he was suffering from disability which will be unending, will last forever; and then proving that this unending is reasonably certain to continue throughout his lifetime. It is not necessary to prove that the disability is permanent in that sense of the word. It is necessary only to show that the disability is reasonably likely to continue throughout the lifetime of the insured. The act itself recognized that this is only a reasonable likelihood and provides for the contingency of a recovery. Consequently the word "permanent" has no legitimate place in these cases if it is to be construed as unending. This court has heretofore recognized this fact as follows:

> "The appellant further contends that ultimate cure is reasonably certain, but this is problematic, to say the least. The probabilities would seem to be the other way. But in any event the policy itself provides for such a contingency because the insured may be called upon at any time to furnish proof satisfactory to the Director of the United States Veterans Bureau of the continuance of his total permanent disability

> and if he fails to furnish such proof, all payments of monthly installments on account of total permanent disability shall cease and all premiums thereafter falling due shall be payable in conformity with the policy." U. S. v. Ranes (CCA 9), 48 Fed. (2d) 582.

Consequently, the court cannot say as a matter of law that the possibility that a cure might be effected can overcome the existing fact that the disability has been permanent, as that term may be defined, over a period of nearly fourteen years.

V.

THE COURT DID NOT GIVE PROPER EVIDENTIARY VALUE TO THE FACT THAT PERMANENCE MAY BE SHOWN BY CONTINUATION OF FACT — IN THIS CASE TOTAL DISABILITY.

We submit that the record is uncontradicted that plaintiff was totally disabled at the time his policy lapsed, or would have lapsed. In the opinion in the Falbo case, this Court stated:

> "The one substantial question is whether or not the court erred in directing the verdict for want of any substantial evidence that the plaintiff was *permanently* disabled in May, 1919, when the policy would otherwise have lapsed."

In this case, total permanent disability was conclusively proved in May, 1922, and that total and permanent disability was a continuation of the theretofore existing total disability. It would seem anomalous to say that a disease which is now total and permanent has not been permanent during all the time of its existence.

It is a well known fact that in making a prognosis of a disease, its response to treatment is a material factor and that, particularly in cases of tuberculosis, two men might be afflicted at the same time and in the course of five years, one of them would become an arrested case and the other would continue an active condition, after which length of time it could be determined that the latter was a permanent condition and the former was not, a fact which obviously would have been unknown at the commencement of the disease in either case. Consequently, we cannot say that in the latter of the two illustrations the man was not permanently disabled from the inception of the disease.

It has recently been held by this court that evidence which is contradicted by physical fact cannot be made the basis of a verdict.

> "The physical facts positively contradicting the statement of a witness control, *and the court*

may not disregard them. (Citing cases.) Judgements should not stand upon evidence that cannot be true." U. S. v. Kerr (CCA 9), 61 Fed. (2d) 800, 803; See also U. S. v. McCreary (CCA 9), 61 Fed. (2d) 804.

The same situation prevails in this case, to-wit, the existence of total disability over a long period of years is a physical fact that must overcome testimony indicating the possibility that the total disability would not continue.

And it has been held in numerous cases that evidence may be sufficient to take a case of this type to the jury where no medical testimony concerning a prognosis is in the record.

U. S. v. Tyrakowski (CCA 7), 50 Fed. (2d) 766; Carter v. U. S. (CCA 4), 49 Fed. (2d) 221; Madray v. U. S. (CCA 4), 55 Fed. (2d) 552; Malavski v. U. S. (CCA 7), 43 Fed. (2d) 974; Kelly v. U. S. (CCA 1), 49 Fed. (2d) 897; Glazow v. U. S. (CCA 2), 50 Fed. (2d) 178.

Likewise this court has held in the case of Mulivrana v. U. S. (CCA 9), 41 Fed. (2d) 734, the evidence was sufficient to take the case to the jury where the earliest testimony concerning the veteran's condition was in 1921, a year and a half after the policy of insurance lapsed.

That the opinion of medical experts is not conclusive as against an existence of fact, has been declared by the Tenth Circuit as follows:

> "However this may be, the jury might well have been inclined to take the positive evidence of the plaintiff to the opinion of the medical men which he called in his behalf. Medical men indulge very generally in theorizing on the affairs of life, while the living of life is a very practical affair." Barksdale v. U. S. (CCA 10), 46 Fed. (2d) 762.

In the present case, the jury might well have found that the positive fact of the continuation of total disability merging into an admittedly permanent disability overweighed any evidence that there may have been a possibility of cure.

> "As permanence of any condition (here total disability) involved the element of time, the event of its continuance during the passage of time is competent and cogent evidence." McGovern v. U. S. (DC), 294 Fed. 108.

It is submitted that the fact to be proved in this case, that is permanence, is susceptible of proof by other evidence than the opinion of experts, as has been recognized by the cases cited herein, and that such fact in this case has been proved by the physical fact of its existence over a long period of years.

"The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject." Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. Ed. 536.

VI.

THE COURT INVADED THE PROVINCE OF THE JURY AND WEIGHED THE EVIDENCE.

This court, we submit, weighed the evidence in this case, and to substantiate its finding disbelieved the testimony of the witnesses heretofore quoted.

The 7th Amendment of the Constitution provided for a trial by jury, and the jury is the sole judge of fact. It devolves upon them, and upon them alone, to determine the truth or falsity of any complicated testimony, as well as to weigh all the testimony to determine its convincing force.

The federal courts have been called upon frequently to determine their power to take cases from the jury and direct verdicts for one party or the other.

Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732; Barney v. Schmeider, 9 Wall. 248, 19 L. Ed. 648; Walker v. New Mexico R. Co., 165 U. S. 593, 17

S. Ct. 421, 41 L. Ed. 837; Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580, 43 L. Ed. 873; Slocum v. N. Y. Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. Ed. 879; Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720.

To quote Justice Storey:

> "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated in and secured in every state constitution in the Union * * *. One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general as to establish its importance as a fundamental guarantee of the rights and liberties of the people." Parsons v. Bedford, 3 Pet. 433, 7 L. Ed. 732.

CONCLUSION

In conclusion, it is respectfully submitted that upon the foregoing grounds this Petition for Rehearing

should be granted and a reconsideration of the record herein should be had.

SMITH, MAHAN & SMITH
HOWARD TOOLE
W. E. MOORE
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

I, John W. Mahan, do hereby certify that I am one of the counsel for the appellant in the above entitled cause; that I have carefully read over and considered the above and foregoing Petition for Rehearing in the above entitled cause, and that in my judgment it is well founded and that it is not interposed for delay.

Dated this 13th day of June, 1933.

JOHN W. MAHAN

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